

IN THE COURT OF CRIMINAL APPEALS OF TENNESSEE
AT NASHVILLE
May 2007 Session

STATE OF TENNESSEE v. RICKY LYNN PAYNE

**Direct Appeal from the Circuit Court for White County
No. CR2150 Leon C. Burns, Jr., Judge**

No. M2006-00762-CCA-R3-CD - Filed July 16, 2007

A White County jury convicted the Defendant of attempted first degree murder, and he was sentenced to twenty years in prison. On appeal, the Defendant contends that: (1) the evidence is insufficient to sustain his conviction; (2) the trial court improperly allowed the 911 operator to testify and improperly admitted the 911 tape; (3) the trial court improperly instructed the jury on “flight”; (4) the trial court improperly instructed the jury to consider offenses in sequential order; and (5) the trial court should have declared a mistrial due to the State’s use of leading questions. Further, we review the Defendant’s sentence based upon the existence of plain error. After a thorough review, we affirm the Defendant’s conviction, but we vacate his sentence and remand the case for further proceedings consistent with this opinion.

**Tenn. R. App. P. 3 Appeal as of Right; Judgment of the Circuit Court Affirmed in Part,
Vacated in Part and Remanded**

ROBERT W. WEDEMEYER, J., delivered the opinion of the court, in which JAMES CURWOOD WITT, JR., and D. KELLY THOMAS, JR., JJ., joined.

David Brady, District Public Defender; John B. Nisbet, III, Assistant District Public Defender, for the Appellant, Ricky Lynn Payne.

Robert E. Cooper, Jr., Attorney General and Reporter; Brent C. Cherry, Assistant Attorney General; William E. Gibson, District Attorney General; Beth Willis and William M. Locke, Assistant District Attorneys General, for the Appellee, State of Tennessee.

**OPINION
I. Facts**

This case arises from the Defendant’s shooting of his brother, Jay Payne. At the Defendant’s trial, the following evidence was presented: Regina Sims testified that she is a dispatcher for White County 911, and she was working in this capacity on November 12, 2004, when she received a call from 4922 Coal Bank Road at 3:00 p.m. The caller stated that she called to report a shooting. The

911 tape was played for the jury.

On the tape, the caller, who does not identify herself, stated that Rick Payne, the Defendant, has just shot Jay Payne. She said that the Defendant left and was driving a Toyota. Describing the incident, she says that the Defendant “pulled in” behind “them” and jumped out of his car and shot Jay Payne. The caller is then heard following Sims’s instructions and rendering aid to Jay Payne.

Jay Payne testified that he lives at 4922 Coal Bank Road, and the Defendant is his brother. Payne said that, a week before this shooting, the Defendant had come to his house and accused him of stealing some race car parts from a race car that the Defendant owned. Payne told the Defendant that his parts and car were located in the back yard. The Defendant said that “it had been changed,” and Payne denied taking anything from the car. The Defendant told Payne that he would be back and that Payne would regret it when he came back. That same night, two deputies came to the house, presumably in response to the Defendant’s accusations. Later, the Defendant called Payne and said, “I’ll kill you, you son-of-a-bitch, you wait and see.” Payne said he did not take the Defendant seriously.

Payne testified that on November 12, 2004, the Defendant shot him. Describing the events leading to the shooting, Payne testified that he had gone into town with his live-in girlfriend, Vivian Hoose, to take care of his banking business. While in town, he also went to the Sheriff’s Department to discuss the problem that he was having with the Defendant. On his way home, the Defendant passed him going the opposite direction. Payne continued going home, and he noticed the Defendant following him. The Defendant followed him to his house, which was about seven miles away. When they arrived at the house, Payne got out of his car, and the Defendant got out of his car. The Defendant then reached over his window with a .357 pistol while stating, “You’ll pay, you son-of-a-bitch, you’re going to pay right now,” and shot Payne. The shot knocked Payne back against the door of this truck, and he then fell over in front of his shed. He knew that he had been shot in the right shoulder.

Payne testified that, as the Defendant got into his car and left, Payne got up and walked from the front of his truck to the house. When he got to the porch, he realized that his injury was worse than he first thought and that he was losing a lot of blood. Payne said that he started losing consciousness but made it into the dining room of his house. Hoose, who was present for all of these events, was in the process of calling 911. Payne testified that he did not have a gun at the time of this incident.

On cross-examination, Payne testified that he and the Defendant raced drag cars together prior to the shooting. The two shared the Defendant’s race car, and they took it to multiple race tracks. Payne agreed that the Defendant was gone for a while, and, when he returned, he helped Payne buy another race car for about \$4,800 in cash, and the Defendant exchanged a four-wheeler for a new motor for the car. Payne said that the two raced that car together, but they never had both cars working at the same time. Payne testified that the parts for the Defendant’s car would not have worked on his car.

Payne denied that the Defendant had talked to Payne about Payne selling multiple items that belonged to the Defendant, including a washer and dryer, three toolboxes, a motorcycle, a stove, and an air compressor. Payne testified that the only thing that the Defendant accused him of stealing was a 600 Holly carburetor, which was valued at \$225. He agreed that, after the Defendant shot him, the Defendant said, "That's a warning, [m]other [f]***er, that's a warning." Payne testified that the Defendant shot him with a revolver, which holds about five or six bullets.

Vivian Hoose testified that on November 12, 2004, she and Payne had gone to pay their bills and were on their way home around 12:00 or 1:00 p.m. when they passed the Defendant traveling the opposite direction. Hoose said that the Defendant turned around, followed Payne and her to their home, and pulled in behind them. Payne immediately got out of the truck and told Hoose to "stay put." Payne and the Defendant exchanged words, and then the Defendant raised a gun and shot Payne. Payne fell back, and Hoose got out of the truck. As she did so, the Defendant pointed the gun at her and said, "That was a warning." He got into his car and drove away in a hurry. Hoose called 911, and she followed the operator's instructions about rendering aid to Payne, who she said was bleeding, pale, shaky, and weak.

On cross-examination, Hoose testified that Payne and the Defendant had previously argued about parts from their race cars. Hoose recalled that they at one point argued about a toolbox. Hoose agreed that she had previously said that the Defendant said, "That's a warning, mother f***er, that's a warning."

Paul Payne testified that he has been Jay Payne's neighbor, and Paul Payne was at his house on November 12, 2004. He said that he heard a bang, and he thought it was an out of control vehicle hitting a tree on his lot. Payne went to his window, he heard a car "fire up, a racing motor, squealing tires," and he saw a "little black car disappearing, going west on Coal Bank Road . . . rather rapidly."

Shanna Whittaker testified that she lived next to Jay Payne. On November 12, 2004, she saw a black car pull into the driveway, and she heard two people "fussing." She then heard a gunshot and someone yell "Rick" three times in a crying panicky voice. She then saw the car back up out of the driveway. Whittaker testified that the car passed her, and she tried to read the license plate number, but the car was traveling too fast.

Detective Chris Isham, with the White County Sheriff's Department, testified that he was the lead detective in this case. When he arrived at the scene of the shooting he saw Payne's truck and the first responder vehicles. He also noticed a blood trail that went from the left side of Payne's truck towards the house. Inside the house, Detective Isham found Payne being treated by the first responders, and he described him as in "extreme pain" and as having lost a lot of blood. The detective obtained a statement from Hoose and took pictures of the crime scene. From the interviews, he learned that the Defendant had shot the victim. The Defendant was no longer at the crime scene, and the Defendant was not arrested until February 12, 2005.

The Defendant testified on his own behalf and agreed that he saw Payne driving and followed

Payne home. He said, though, that once they got to Payne's house the Defendant asked Payne if he was ready to settle up on the transmission deal and all the car parts. Payne told him that he was not going to settle up on anything and said, "I told you, mother f***er, I ain't [sic] settling up on nothing [sic]." The Defendant said that he pulled a gun with his right hand and shot him. After shooting his brother, the Defendant said, "[T]hat was a warning, mother f***er, that was your warning." The Defendant said that he then got into his car and left.

The Defendant explained that he had believed in his brother and that his brother had let him down. He said he had purchased his brother a race car because he wanted them to race as a team. Then, one week before the Defendant "got back," Payne took the Defendant's car apart and "scatter[ed] everything all over the place." He said that he discussed this with Payne on three separate occasions, and Payne said that he was going to take care of the situation. The Defendant testified that, after those conversations, the brothers were getting along, but then about ten days before the shooting Payne made a "complete turn around." He did not want to take care of anything, and the Defendant left Payne's house angry. The Defendant said that he packed up his things, and he was going to leave. On his way out, he saw his brother, and his brother "flipped [him] a bird," which "triggered" him.

The Defendant said that he was sorry that he shot his brother and that he should not have done so. He said, though, that it was a very difficult time of his life, and he had lost everything that he had. The Defendant said that he did not intend to kill his brother, and he was a good shot and usually hit where he aimed.

On cross-examination, the Defendant testified that his brother had let him down in many ways. One way was by using only \$4,800 of the \$7,500 that the Defendant had given to Payne to bury their father and spending the excess. The Defendant's brother also let him down by taking apart his race car and getting rid of the parts. The Defendant agreed that further justification for the shooting was that Payne "flipped [him] off." The Defendant denied that he ever threatened his brother prior to this incident. The Defendant said that he had not spoken with his brother since the shooting, he did not go to the hospital, and he had not apologized. The Defendant conceded that he knew there was a gun in his car when he turned around and followed Payne home. He said that the gun was not loaded, and he loaded it on the way to Payne's house. He agreed that he "pretty much" knew what he was going to do with the gun. He said, however, that he did not intend to kill his brother, and he would have killed him if that was his intention. The Defendant testified that his brother was unarmed at the time of the shooting. He further said that, while Payne had not threatened him, he had laughed at him. The Defendant testified that he did not wait for the police to arrive, and, after the shooting, he got a motel room. His only contact with his brother was when he called his brother to tell him not to take his motorcycle.

Based upon this evidence, the jury convicted the Defendant of attempted first degree murder, and he was sentenced to twenty years in prison.

II. Analysis

On appeal, the Defendant contends that: (1) the evidence is insufficient to sustain his conviction; (2) the trial court improperly allowed the 911 operator to testify and improperly admitted the 911 tape; (3) the trial court improperly instructed the jury on “flight”; (4) the trial court improperly instructed the jury to consider offenses in sequential order; and (5) the trial court should have declared a mistrial due to the State’s use of leading questions. Additionally, we review the Defendant’s sentence pursuant to the doctrine of plain error.

A. Sufficiency of the Evidence

The Defendant asserts that the proof at trial is insufficient to prove that he acted with premeditation or that he intended to kill his brother, both of which are required elements to support his conviction for attempted first degree murder. When an accused challenges the sufficiency of the evidence, this Court’s standard of review is whether, after considering the evidence in the light most favorable to the State, “any rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt.” *Jackson v. Virginia*, 443 U.S. 307, 319 (1979); *see* Tenn. R. App. P. 13(e); *State v. Goodwin*, 143 S.W.3d 771, 775 (Tenn. 2004) (citing *State v. Reid*, 91 S.W.3d 247, 276 (Tenn. 2002)). This rule applies to findings of guilt based upon direct evidence, circumstantial evidence, or a combination of both direct and circumstantial evidence. *State v. Pendergrass*, 13 S.W.3d 389, 392-93 (Tenn. Crim. App. 1999).

In determining the sufficiency of the evidence, this Court should not re-weigh or re-evaluate the evidence. *State v. Matthews*, 805 S.W.2d 776, 779 (Tenn. Crim. App. 1990). Nor may this Court substitute its inferences for those drawn by the trier of fact from the evidence. *State v. Buggs*, 995 S.W.2d 102, 105 (Tenn. 1999); *Liakas v. State*, 286 S.W.2d 856, 859 (Tenn. 1956). “Questions concerning the credibility of the witnesses, the weight and value of the evidence, as well as all factual issues raised by the evidence are resolved by the trier of fact.” *State v. Bland*, 958 S.W.2d 651, 659 (Tenn. 1997); *Liakas*, 286 S.W.2d at 859. “A guilty verdict by the jury, approved by the trial judge, accredits the testimony of the witnesses for the State and resolves all conflicts in favor of the theory of the State.” *State v. Cabbage*, 571 S.W.2d 832, 835 (Tenn. 1978); *State v. Grace*, 493 S.W.2d 474, 476 (Tenn. 1973). The Tennessee Supreme Court stated the rationale for this rule:

This well-settled rule rests on a sound foundation. The trial judge and the jury see the witnesses face to face, hear their testimony and observe their demeanor on the stand. Thus the trial judge and jury are the primary instrumentality of justice to determine the weight and credibility to be given to the testimony of witnesses. In the trial forum alone is there human atmosphere and the totality of the evidence cannot be reproduced with a written record in this Court.

Bolin v. State, 405 S.W.2d 768, 771 (Tenn. 1966) (citing *Carroll v. State*, 370 S.W.2d 523 (Tenn. 1963)). This Court must afford the State of Tennessee the strongest legitimate view of the evidence contained in the record, as well as all reasonable inferences which may be drawn from the evidence. *Goodwin*, 143 S.W.3d at 775 (citing *State v. Smith*, 24 S.W.3d 274, 279 (Tenn. 2000)). Because a

verdict of guilt against a defendant removes the presumption of innocence and raises a presumption of guilt, the convicted criminal defendant bears the burden of showing that the evidence was legally insufficient to sustain a guilty verdict. *State v. Carruthers*, 35 S.W.3d 516, 557-58 (Tenn. 2000). Importantly, the credibility of the witnesses, the weight to be given their testimony, and the reconciliation of conflicts in the evidence are matters entrusted exclusively to the jury as the trier of fact. *Bland*, 958 S.W.2d 651 at 659.

In this case, the Defendant was convicted of attempted first degree murder. Tennessee Code Annotated Section 39-12-101(a) states:

A person commits criminal attempt who, acting with the kind of culpability otherwise required for the offense:

(1) Intentionally engages in action or causes a result that would constitute an offense if the circumstances surrounding the conduct were as the person believes them to be;

(2) Acts with intent to cause a result that is an element of the offense, and believes the conduct will cause the result without further conduct on the person's part; or

(3) Acts with intent to complete a course of action or cause a result that would constitute the offense, under the circumstances surrounding the conduct as the person believes them to be, and the conduct constitutes a substantial step towards the commission of the offense.

T.C.A. § 39-12-101(a)(1)-(3) (2003). First degree murder is the premeditated and intentional killing of another. T.C.A. § 39-13-202(a)(1) (2003). "Premeditation" is defined as "an act done after the exercise of reflection and judgment." T.C.A. § 39-13-202(d) (2003). This is a question of fact for the jury to determine, and it can be inferred from a number of circumstances, including the following: "the use of a deadly weapon upon an unarmed victim; the particular cruelty of the killing; declarations by the defendant of an intent to kill; evidence of procurement of a weapon; preparations before the killing for concealment of the crime; and calmness immediately after the killing." *Bland*, 958 S.W.2d at 660. An "intentional" killing is one committed by a person "who acts intentionally with respect . . . to a result of the conduct when it is the person's conscious objective or desire to . . . cause the result." T.C.A. § 39-11-302(a) (2006).

In the case under submission, the evidence viewed in the light most favorable to the State proved that the Defendant went to the victim's house a week before the shooting and threatened to kill him. The Defendant then packed everything he owned, including a gun and ammunition, into his car. He passed the victim on the road, turned around, and followed him to the victim's house. While following the victim, the Defendant loaded his gun, knowing "pretty much" what he intended to do with the gun. The Defendant got out of his car and exchanged words with the victim, who had also gotten out of his car. The Defendant then raised his gun and shot the victim. The Defendant left the scene of the shooting immediately after it occurred, and witnesses described him as traveling rapidly. This evidence and these circumstances are sufficient to support the jury's inference that the

Defendant acted with premeditation when he raised the gun and shot the victim.

The Defendant contends that he did not intend to kill his brother, but rather that he intended to shoot him as a “warning.” He asserts that he is a good shot and that he would have killed his brother if he so intended. Viewing the facts in a light most favorable to the State, a rational juror could conclude beyond a reasonable doubt that the Defendant intended to kill Jay Payne by shooting him. After threatening to kill Jay Payne a week before the shooting, the Defendant followed Jay Payne home, jumped out of his car, and shot him in the arm/chest area. He then pointed the gun at Hoose and stated “that was a warning.” It is unclear whether the Defendant was warning Hoose or Jay Payne. A rational jury could find that the Defendant intended to kill Jay Payne under these circumstances and that the shooting was a substantial step toward the commission of first degree premeditated murder. Therefore, the evidence was sufficient for a rational juror to conclude beyond a reasonable doubt that the Defendant was guilty of attempted first degree murder. The Defendant is not entitled to relief on this issue.

B. The 911 Tape Recording

The Defendant makes two arguments with respect to the 911 tape recording. First, he asserts that the 911 operator’s name was never disclosed to the defense prior to trial. As such, allowing the operator to testify amounted to “trial by ambush.” Next, the Defendant contends that the 911 tape was improperly admitted because it was never properly authenticated.

1. 911 Operator

In response to the Defendant’s first contention, the State notes that, before trial, the Defendant’s counsel told the court:

I will say that [the State] has given me copies of the – there were DVDs that I was able to play, and we talked about which one [the State] was going to play. I also have another objection too. Whoever the 911 person is, I still don’t know her name. [The State] did say that [it] planned to call the 911 operator, or someone from the 911 Center. Under no, nothing that I have found do I ever see a name of anybody that seems to be from 911, so I object to it.

The State asserts on appeal that this proves that the Defendant had notice of the content of the 911 tape and that it intended to call the 911 operator. Further, the State asserts that the Defendant never requested the actual name of the operator and that the lack of her name was not prejudicial to the Defendant.

Pursuant to T.C.A. § 40-17-106, the district attorney general is to list upon the indictment the names of witnesses expected to be called at trial. This duty is directory only. *State v. Baker*, 751 S.W.2d 154, 164 (Tenn. Crim. App. 1987); *State v. Underwood*, 669 S.W.2d 700, 703 (Tenn. Crim. App. 1984). Accordingly, failure to include a name on the list does not necessarily disqualify that witness from testifying. *State v. Street*, 768 S.W.2d 703, 711 (Tenn. Crim. App. 1988). However,

the statute is intended to prevent surprise to a defendant and to ensure that the defendant will not be handicapped in defense preparation. *State v. Morris*, 750 S.W.2d 746, 749 (Tenn. Crim. App. 1987). A defendant will be entitled to relief for nondisclosure if he or she can demonstrate prejudice, bad faith, or undue advantage. *State v. Harris*, 839 S.W.2d 54, 69 (Tenn. 1992); *State v. Kendricks*, 947 S.W.2d 875, 883 (Tenn. Crim. App. 1996). The decision to allow a witness to testify is discretionary with the trial court. *Kendricks*, 947 S.W.2d at 883.

In the case under submission, it is clear that the Defendant had knowledge of the substance of the 911 operator's testimony prior to trial in that the operator simply testified about the 911 call, of which the Defendant apparently had a copy. The Defendant has not demonstrated prejudice, bad faith, or undue advantage, and we cannot conclude that the trial court abused its discretion by allowing the 911 operator to testify.

2. Authentication

The Defendant contends that the 911 tape was not properly authenticated because there was no testimony that the tape was an accurate reproduction of the conversation or how the tape was processed. The State contends that it asked the 911 operator questions that established that the operator was working on November 12, 2004, when the call came in, that she had listened to the tape, and that she recognized her own voice on the tape. The State concedes that it may have been more proper for the operator to view her initials on the tape and testify on the record that the tape offered into evidence was the same tape to which she had listened, but it asserts that any error was harmless.

At trial, the 911 operator testified that she is a White County 911 dispatcher, and she was working in this capacity on November 12, 2004. She testified that, when a call comes into the 911 center, she can see on her ANI/ALI database the location from which the call is being made. The operator testified that she met with the State's attorney and an investigator the previous week and that she listened to the 911 call at issue in this case. She identified her own voice on the 911 call and stated that the call accurately depicted the events that took place on November 12, 2004. She said that she again listened to the tape the morning of trial, and she initialed the tape after listening to it. The tape was the same as she had listened to the week before trial and was of the phone call that she received on November 12, 2004. The tape was then played for the jury.

Tennessee Rule of Evidence 901 governs the authentication of evidence. Specifically, the rule provides that authentication may be made as follows: "(5) *Voice Identification*. Identification of a voice, whether heard firsthand or through mechanical or electronic transmission or recording, by opinion based upon hearing the voice at any time under circumstances connecting it with the alleged speaker." Tenn. R. Evid. 901(b)(5). The rule provides that the "requirement of authentication or identification as a condition precedent to admissibility is satisfied by evidence sufficient to the court to support a finding by the trier of fact that the matter is what its proponent claims." Tenn. R. Evid. 901(a). Once this foundation is presented, the "trier of fact then makes the ultimate decision of whether the item is actually what it purports to be." Cohen et al., § 901.1 at 613; accord *State v. Hinton*, 42 S.W.3d 113, 127 (Tenn. Crim. App. 2000). A trial court's ruling on the

authentication of evidence will not be overruled absent an abuse of discretion. *See State v. Arnold L. Jones*, No. M1999-00851-CCA-R3-CD, 2000 WL 1843415, at *4 (Tenn. Crim. App., at Nashville, Dec. 14, 2000).

We conclude that the trial court did not abuse its discretion when it determined that there was an adequate foundation presented to authenticate the 911 tape. The 911 operator identified her own voice on the tape and testified that the recording was from the November 12, 2004, shooting. The operator further testified she had listened to this tape twice before trial, identifying her voice each time, and she had listened to and initialed the tape the morning before it was played for the jury. The Defendant is not entitled to relief on this issue.

C. Flight Instruction

The Defendant asserts that the trial court improperly instructed the jury on “flight” when it was not warranted by the facts. Further, he asserts that the flight instruction lessened the State’s standard of proof because it instructs the jury that “the flight of a person accused of a crime is a circumstance which, when considered with all of the facts in the case, may justify an inference of guilt.” This inference, the Defendant asserts, allows the State a lower burden of proof. The State counters that there was sufficient proof to support the flight instruction.

A flight instruction is warranted when “proof of ‘both a leaving the scene of the difficulty and a subsequent hiding out, evasion, or concealment in the community, or a leaving of the community for parts unknown’” has been presented at trial. *State v. Burns*, 979 S.W.2d 279, 289-90 (Tenn. 1998) (quoting *State v. Payton*, 782 S.W.2d 490, 498 (Tenn. Crim. App. 1989)). In the case under submission, the proof presented at trial was that the Defendant went to his brother’s house after packing all of his possessions in his car. He then shot his brother, hurriedly left the scene of the shooting, and went to a motel room. We conclude that this evidence is sufficient to support the flight instruction.

With respect to the Defendant’s second contention, that this instruction improperly lessens the State’s burden of proof, our Supreme Court has concluded that Tennessee law allows an instruction as to the inferences to be drawn from a defendant’s flight notwithstanding the criticism leveled at such an instruction by other state courts. *State v. Harris*, 839 S.W.2d 54 (Tenn. 1992). This Court must follow the decisions of our Supreme Court. *State v. Burton*, 751 S.W.2d 440, 449 (Tenn. Crim. App. 1988). Accordingly, this Court has held that “[b]ecause this State subscribes to the majority view approving the [flight] instruction under appropriate circumstances, this Court must hold, even in the face of a well-reasoned minority trend, that the jury charge on the issue of flight was not error.” *Payton*, 782 S.W.2d at 498; *accord State v. Kendricks*, 947 S.W.2d 875 (Tenn. Crim. App. 1996) (holding that a jury instruction on flight is proper if warranted by the evidence).

D. Sequential Jury Instructions

The Defendant next contends that the trial court improperly instructed the jury to consider offenses in sequential order, which required the jury to find the Defendant not guilty of attempted

first degree murder before proceeding to consider attempted second degree murder and before proceeding to consider attempted voluntary manslaughter. The Defendant asserts that the jury, therefore, never considered his contention that he acted in a state of passion when he shot his brother.

In Tennessee, the general rule is that “sequential” jury instructions are proper. *State v. Mann*, 959 S.W.2d 503, 521 (Tenn. 1997); *State v. Raines*, 882 S.W.2d 376, 382 (Tenn. Crim. App. 1994). There has been some discussion by cases from this Court about whether there should be an exception to the general rule to recognize the unique relationship between second degree murder and voluntary manslaughter.¹ This discussion has been prompted primarily by a concurring opinion authored by Judge Joseph M. Tipton in the case of *State v. Ernest Gwen Humphrey*, No. M2003-01489-CCA-R3-CD, 2005 WL 2043778 (Tenn. Crim. App., at Nashville, Aug. 24, 2005), *perm. app. denied* (Tenn. Feb. 6, 2006). In that opinion, Judge Tipton first noted that the elements of second degree murder must be proven as a predicate to a finding of guilty of voluntary manslaughter and then commented:

When evidence justifies an instruction on voluntary manslaughter, the trial court should instruct the jury so as to ensure adequate consideration of both second degree murder and voluntary manslaughter. That is, if a sequential offense consideration instruction is given, the instruction dealing with second degree murder should also advise the jury relative to the issue of passion upon adequate provocation relative to voluntary manslaughter.

Id. at *15. Judge Tipton opined that the problem would be resolved when a trial court instructs the jury, via Tennessee Pattern Instruction-Criminal 7.05(a), that “[t]he distinction between voluntary manslaughter and second degree murder is that voluntary manslaughter requires that the killing result from a state of passion produced by adequate provocation sufficient to lead a reasonable person to act in an irrational manner.” *Id.*; *see also* T.P.I.-Criminal 7.05(a) (8th ed. 2004). Judge Tipton, who concurred in affirming the conviction in *Humphrey*, agreed that binding precedent allows the use of an instruction for sequential consideration of the homicide grades. *Humphrey*, 2005 WL 2043778, at *15.

In the case under submission, we note that the same reasoning would be applicable to instructions on the attempted versions of each of the homicide grades. We equally recognize the potential, as did Judge Tipton, that a jury deliberating sequentially on second degree murder might disregard the effect of passion resulting from adequate provocation even when the record establishes a basis for the claim. In this case, however, the jury convicted the Defendant of attempted premeditated first degree murder, rejecting the lesser-included offense of attempted second degree murder. Therefore, the Defendant was not prejudiced by inadequate consideration by the jury of the

¹Second degree murder is the knowing killing of another. T.C.A. § 39-13-201(a)(1) (2003). Voluntary manslaughter is committed by one who intentionally or knowingly kills another “in a state of passion produced by adequate provocation sufficient to lead a reasonable person to act in an irrational manner.” *Id.* § 39-13-211(a). “The danger arising from instructing the jury that it must consider and acquit for second-degree murder before considering voluntary manslaughter,” argues the defendant in his brief, “is that the jury is barred from considering the significance of passion relative to the issue of second-degree murder versus voluntary manslaughter.”

distinction between second degree murder and voluntary manslaughter.² The Defendant is not entitled to relief on this issue.

E. Leading Questions

The Defendant next contends that the trial court erred when it failed to declare a mistrial based upon the State's use of leading questions. The propriety, scope, manner and control of the examination of witnesses are within the sound discretion of the trial court. *State v. Humphreys*, 70 S.W.3d 752, 766-67 (Tenn. Crim. App. 2001). The ruling of the trial court in this regard will not be overturned absent an abuse of that discretion. *State v. Harris*, 839 S.W.2d 54, 75 (Tenn. 1992). "An abuse of discretion exists when the reviewing court is firmly convinced that the lower court has made a mistake in that it affirmatively appears that the lower court's decision has no basis in law or in fact and is therefore arbitrary, illogical, or unconscionable." *State v. Brown Williamson Tobacco Corp.*, 18 S.W.3d 189, 191 (Tenn. 2000).

The decision of whether to grant a mistrial is also within the sound discretion of the trial court. *State v. McKinney*, 929 S.W.2d 404, 405 (Tenn. Crim. App. 1996). This Court will not disturb that decision absent a finding of an abuse of discretion. *State v. Adkins*, 786 S.W.2d 642, 644 (Tenn. 1990). "Generally, a mistrial will be declared in a criminal case only when there is a 'manifest necessity' requiring such action by the trial judge." *State v. Millbrooks*, 819 S.W.2d 441, 443 (Tenn. Crim. App. 1991). "The purpose for declaring a mistrial is to correct damage done to the judicial process when some event has occurred which precludes an impartial verdict." *State v. Williams*, 929 S.W.2d 385, 388 (Tenn. Crim. App. 1996). In determining whether there is a "manifest necessity" for a mistrial, "no abstract formula should be mechanically applied and all circumstances should be taken into account." *State v. Mounce*, 859 S.W.2d 319, 322 (Tenn. 1993) (citation omitted).

Rule 611 of The Tennessee Rules of Evidence vests the trial court with the discretionary authority to supervise the presentation of evidence. The rule specifically addresses leading questions, stating:

Leading questions should not be used on the direct examination of a witness except as may be necessary to develop testimony. Leading questions should be permitted on cross-examination. When a party calls a witness determined by the court to be a hostile witness, interrogation may be by leading questions.

Tenn. R. Evid. 611(c).

In the case under submission, we first note that this proceeding was conducted by a learned and experienced trial judge who is more than able to determine whether the proceedings were tainted by leading questions.

²We note that, in its instructions, the trial court included proper definitions of second degree murder and voluntary manslaughter, including the distinction involving passion upon adequate provocation.

Further, as stated by Rule 611(c), leading questions should not be used on direct examination except as may be necessary to develop testimony. In this case, many of the questions objected to by the Defendant were simply used by the prosecutor to develop the relevant testimony and were clearly not prejudicial to the Defendant. We further conclude that the trial court did not abuse its discretion when it determined that any objectionable questions did not preclude an impartial verdict so as to require it to declare a mistrial. The Defendant is not entitled to relief on this issue.

F. Sentencing

At oral argument, the Defendant's counsel raised the issue of whether the Defendant was appropriately sentenced pursuant to the post-2005 sentencing law, as opposed to the pre-2005 law. This issue was not raised in the Defendant's motion for new trial, he did not appeal the issue, and he did not brief the issue. Accordingly, the Defendant has waived this issue. *See* Tenn. R. App. P. 3(e) (stating that "in all cases tried by a jury, no issue presented for review shall be predicated upon error in the admission or exclusion of evidence, jury instructions granted or refused, . . . or other ground upon which a new trial is sought, unless the same was specifically stated in a motion for a new trial; otherwise such issues will be treated as waived"). The Defendant's failure to raise the issue precludes our review of this issue, subject to our noticing "plain error." *See* Tenn. R. App. P. 3(e); Tenn. R. App. P. 36(a).

Issues that rise to the level of plain error lie within the sound discretion of the appellate court and may be considered: (1) to prevent needless litigation; (2) to prevent injury to the interests of the public; and (3) to prevent prejudice to the judicial process, prevent manifest injustice, or to do substantial justice. *See* Tenn. R. App. P. 13(b); Tenn. R. Crim. P. 52(b); *State v. Adkisson*, 899 S.W.2d 626, 638-39 (Tenn. Crim. App. 1994). In *Adkisson*, this Court stated that the following factors should be considered by an appellate court when determining whether an error constitutes "plain error": (a) the record must clearly establish what occurred at the trial court; (b) a clear and unequivocal rule of law must have been breached; (c) a substantial right of the accused must have been adversely affected; (d) the accused did not waive the issue for tactical reasons; and (e) consideration of the issue is "necessary to do substantial justice." *Adkisson*, 899 S.W.2d at 641-42 (citations omitted). Our Supreme Court has characterized the *Adkisson* test as a "clear and meaningful standard" and emphasized that each of the five factors must be present before an error qualifies as plain error. *State v. Smith*, 24 S.W.3d 274, 282-83 (Tenn. 2000).

In the case under submission, the record clearly establishes what occurred in the trial court, and a clear and unequivocal rule of law has been breached. The trial court incorrectly sentenced the Defendant in this case pursuant to the post-2005 sentencing law. The Defendant shot his brother on November 12, 2004, and the court sentenced him on December 13, 2005. Because he committed the offense prior to the current sentencing law's effective date, June 7, 2005, he should have been sentenced pursuant to the pre-2005 sentencing law. This was clearly a breach of an unequivocal rule of law. *See State v. Rex Aaron Nelson*, No. E2006-01333-CCA-R3-CD, 2007 WL 1296943, at *6 (Tenn. Crim. App., at Knoxville, May 3, 2007).

Further, a substantial right of the Defendant's has been adversely affected. The new

sentencing scheme that became effective for offenses committed on or after June 7, 2005, provides that “defendants who are sentenced after June 7, 2005, for offenses committed on or after July 1, 1982, may elect to be sentenced under the provisions of the act by executing a waiver of such defendant’s ex post facto provisions.” *See* 2005 Tenn. Pub. Acts ch. 353 § 18; T.C.A. § 40-35-102 (2006), Compiler’s Notes. The record in this case contains no such waiver. In our view, sentencing the Defendant pursuant to the “new” law without such a waiver adversely affects a substantial right of the Defendant.

Next, we consider whether the Defendant waived this issue for tactical reasons. The failure to include the waiver of his ex post facto rights, as required by the post-2005 law, cannot be said to be strategic in that the waiver itself is required by law. Finally, we are constrained to conclude that consideration of the issue is “necessary to do substantial justice” because of the importance of the Defendant’s ex post facto rights. Therefore, we must vacate the sentence and remand this case for re-sentencing.

On remand, the trial court should ensure that the defendant properly executes a waiver of his ex post facto protections if he wishes to be sentenced under the amended sentencing statutes. *See* T.C.A. § 40-35-210, Compiler’s Notes; *see also State v. Bobby Dale Parris*, No. E2006-00893-CCA-R3-CD, 2007 WL 1498466, at *3-4 (Tenn. Crim. App., at Knoxville, May 23, 2007) (remanding for re-sentencing under the old law or for proper execution of a waiver of ex post facto protections); *State v. Timothy R. Bouton*, No. E2005-02294-CCA-R3-CD, 2006 WL 2373471, at *2 (Tenn. Crim. App., at Knoxville, June 27, 2006) (remanding for re-sentencing under the old law or for proper execution of a waiver of ex post facto protections).

III. Conclusion

In accordance with the foregoing reasoning and authorities, the Defendant’s conviction is affirmed. The sentencing order is vacated and the case is remanded for further proceedings consistent with this opinion.

ROBERT W. WEDEMEYER JUDGE